Date: 20080827

Files: 561-02-126, 128, 129 and 130

Citation: 2008 PSLRB 70

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

HÉLÈNE DUMONT, FRANÇOISE GAUTHIER TARDIF, MICHELINE BOULAY AND FRANCINE JOMPHE

Complainants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Dumont et al. v. Public Service Alliance of Canada

In the matter of complaints made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Complainants: Hélène Dumont

For the Respondent: Guylaine Bourbeau, Public Service Alliance of Canada

Heard at Quebec, Quebec,
June 18, 2008.
(PSLRB Translation)

I. Complaints before the Board

[1] The complainants, Hélène Dumont, Françoise Gauthier Tardif, Micheline Boulay and Francine Jomphe, each filed a complaint against their union, the Public Service Alliance of Canada ("the respondent"). The complaints were initially filed with the Public Service Labour Relations Board ("the Board") on November 10, 2006. Following the Board's request for more information, amended complaints were filed on December 27, 2006.

[2] In Part 3 of the complaint form, the complainants indicated that they based their complaints on paragraph 190(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"). That paragraph deals with a failure by the employer or bargaining agent to comply with section 106 of the *Act*, namely, the duty to bargain in good faith.

[3] On November 2, 2007, the complainants asked the Board to combine their complaints and to deliver a single decision that would apply to each complaint.

II. Objections to the Board's jurisdiction

[4] The respondent raised two objections to the Board's jurisdiction to hear and determine the complaints. In the first objection, the respondent submitted that the complaints had been filed after the 90-day time limit set out in subsection 190(2) of the *Act*. In the second objection, the respondent alleged that the complainants could not validly base a complaint against their union on paragraph 190(1)(*b*) of the *Act*, which deals with the duty to bargain in good faith.

[5] The two objections were taken under reserve, and the complainants submitted evidence on the objections and on the merits of their complaints. The respondent, for its part, presented no evidence.

[6] After hearing the evidence submitted by the complainants, the respondent withdrew its objection regarding the time limit for filing complaints but maintained the second objection regarding the subject matter of the complaints.

III. Summary of the evidence

[7] Essentially, the complainants allege that the respondent misdirected them and that it represented them poorly in the proceedings that they brought to challenge their layoffs. Ms. Dumont, who acted as the complainants' principal representative, testified, detailing the course of events that led to the filing of the complaints.

[8] The complainants were employed by Human Resources Development Canada (HRDC or "the employer") under term contracts. On September 26, 2003, when their contracts expired, they were laid off. As of that date, they had held their positions for nearly two years and nine months. They were rehired on or about December 15, 2003. They argue that the employer laid them off for a period of over 60 consecutive days to prevent them from accumulating three years' continuous service and obtaining indeterminate positions.

[9] Ms. Dumont stated that, on the recommendation of their union local, the complainants first challenged their layoffs before the Public Service Commission (PSC). They filed a request for investigation with the PSC on November 6, 2003.

[10] In a letter to Ms. Dumont dated March 22, 2004, the PSC's deputy registrar indicated that the questions raised by the complainants were not within the PSC's jurisdiction and that the *Term Employment Policy* applicable in the circumstances was the Treasury Board's responsibility. In that letter, the Deputy Registrar referred Ms. Dumont specifically to section 8 of the Treasury Board's policy, which "[requires the Department to] provide for a temporary review mechanism for a term employee who believes he/she is not being renewed for the purpose of not being made indeterminate."

[11] On April 22, 2004, the respondent, through Marc Labrecque, filed a complaint with the Treasury Board challenging the complainants' layoffs.

[12] The Public Service Human Resources Management Agency of Canada handled the complaint. In a letter to Mr. Labrecque dated July 26, 2004, Richard Burton, Vice-President, Human Resources Management Modernization Branch, concluded, as a result of the investigation conducted with the HRDC, that the Department's decision not to extend the complainants' contracts was based on operational requirements and was consistent with the policy's objective of balancing the fair treatment of term employees with the need for operational flexibility.

[13] Ms. Dumont stated that between August 2004 and October 2005, the complainants proceeded with their recourse against the employer. She further stated that a new manager had acknowledged that they had been the victims of an injustice. Based on those new circumstances, the complainants decided to again put the matter before Mr. Burton.

[14] On October 24, 2005, Mr. Labrecque, on the complainants' behalf, sent Mr. Burton an application for review of the decision rendered in July 2004.

[15] On November 25, 2005, Mr. Burton dismissed the application for review as follows:

> [Translation]
>
> . . .
>
> *As you know, administration of the* Term Employment Policy *(TEP) is a matter for the departments. Consequently, the Public Service Human Resources Management Agency of Canada (PSHRMAC) does not get involved in the day-to-day administration of either the TEP or departmental human resources.*
>
> *Accordingly, when we received your complaint dated April 22, 2004, our involvement consisted of verifying whether the Department's decision was contrary to the spirit of the policy. After analyzing the information at our disposal, it became apparent that the Department's decision (at least three months before the complainants had a total of three years' service) not to extend the complainant employees' contracts was justified by budgetary constraints and was in no way an infringement of the TEP.*
>
> *You state in your letter that the situation has just changed in the Department, since the former management has been replaced by a new one, and that the new management unofficially admitted that this case involved an injustice, although nothing was done to correct the situation. We must unfortunately repeat that administration of the TEP and human resource planning are above all the Department's responsibility. It is up to the Department to organize its human resources in accordance with its requirements and the budget at its disposal and to deal with conflicts that may sometimes arise. Therefore, we suggest that you continue your discussions with those responsible.*
>
> . . .

[16] It appears from various emails presented in evidence that the discussions between the complainants and the respondent's local representatives did subsequently take place and that several exchanges took place between various representatives of the respondent about the action to be taken on the complainants' case.

[17] In April 2006, the respondent agreed to submit the matter to a lawyer. Delays resulted from the respondent's need to find a francophone lawyer. It appears from the emails exchanged between various representatives of the respondent that at one point the respondent's local was not satisfied with the time taken by the respondent's representatives in the Ottawa office to deal with the request for a legal opinion and to find a francophone lawyer. The case was finally submitted to Ronald Bélec of the firm Bélec & Associés.

[18] Mr. Bélec issued a legal opinion in writing on August 15, 2006. The following is an extract of that opinion:

> [Translation]
>
> . . .
>
> *The reason given for not extending the employees' (complainants') contracts, according to the Department in question, was justified by budgetary constraints, and if that was the case, the decision was not a breach of the Term Employment Policy (TEP).*
>
> *In addition, under the circumstances, the burden of proving that there was an injustice in the non-renewal of the contracts before three (3) years of employment had passed rests with the complainants.*
>
> *There is no recourse under the legislation or the regulations adopted by the Treasury Board to correct the situation where an injustice has been committed, since the Department has discretion that it may exercise as it sees fit, provided the discretion is not exercised dishonestly or unfairly. Only a complaint may be used to object to this situation, and the complaint must be handled by the Department in an objective, impartial and timely manner.*
>
> *Therefore, the Department would have the power and the right to deal with conflicts that may arise as a result of its decisions to end any employment contracts that it decides to terminate before the three (3) years mentioned above.*

> *Finally, it should be kept in mind that administration of the Term Employment Policy (TEP) and human resource planning are entirely the responsibility of the Department in question. As such, again under the new policy issued by the Treasury Board, it is up to the Department to administer, organize and decide on human resource requirements, without any right of appeal. Therefore, it alone has the responsibility for performing those tasks in accordance with its requirements and its administrative budget.*
>
> *Thus, only one suggestion can be made, that negotiations continue with the managers responsible for this program in the Department.*
>
> *It should be noted that over two (2) years have passed since the unfavourable decision. Time is short, as the complaint will become null and void, if that is not already the case.*
>
> *Finally, at this stage we clearly cannot give you any information about the likelihood that the six (6) complainants will succeed in having the Department's impugned decision reviewed by the Federal Court of Canada.*
>
> *It should be kept in mind that the system described above, introduced by the Treasury Board, was known and accepted by the complainants at the time they were hired. Nothing was concealed. They were fully aware of the rules of the game.*
>
> *In addition, review by the Federal Court of Canada would be very difficult for the complainants, as they would have to prove that the Department acted dishonestly, maliciously and unfairly toward them and that it did not observe the Treasury Board's rules, to say nothing of the fact that over two (2) years have passed since the complaint was filed with the Department.*
>
> . . .
>
> [Emphasis in the original]

[19] Ms. Dumont stated that the complainants never met with Mr. Bélec or discussed anything with him before he issued his legal opinion and that they did not know on what information he based his opinion.

[20] Ms. Dumont further stated that on September 29, 2006, the complainants sent a letter to the representative of their union local, Mona Labbé, asking her to send Mr. Bélec a request for more information about with his legal opinion. Ms. Dumont stated that she has never received the requested information.

[21] Dissatisfied with Mr. Bélec's opinion, the complainants decided to consult a second lawyer, Marcel Croteau. That consultation took place on September 28, 2006. In an email to Ms. Dumont on October 3, 2006, Mr. Croteau wrote:

> [Translation]
>
> . . .
>
> *The manner in which your employment contracts were interrupted and then renewed raises some questions as to the legality of the process, the effect of which was to prevent your acquiring a more stable status in the federal public service. In our opinion, job insecurity should not be an acceptable administrative policy, and the details of this case should be looked into to determine whether it is valid in legal terms.*
>
> *As we indicated to you, such a review would inevitably entail costs. That is why we advised you to discuss the matter with your union, which, in our humble opinion, based on its duty of representation, should assist you in your efforts to reclaim your stability and dignity as employees and, in particular, should commission a much more thorough study than the one that you showed us.*
>
> . . .

[22] On October 3, 2006 Ms. Dumont asked for the respondent's financial assistance to proceed with legal action. Ms. Dumont's request reads as follows:

> [Translation]
>
> . . .
>
> *Further to our complaint about our unjustified dismissal, and after consulting a lawyer from a private firm, we request your financial aid in going ahead with our legal proceedings.*
>
> *As members of the union, we rely heavily on your assistance in bringing an end to the battle that we have been waging for several years.*
>
> . . .

[23] On October 10, 2006, Ms. Labbé sent the complainants the email she received from Réjean Genest, the respondent's regional vice-chairperson (Quebec):

> [Translation]

. . .

> *Hi. When I last met with these members (and you were present), it was to agree that an application should be made to the National NHWU for a francophone lawyer to review the case and that it would be the last action requested and paid for by the National; after performing a review, the lawyer would decide whether the case should continue to be defended.*
>
> *At that meeting, I clearly stated that if these members were to undertake further proceedings it would be at their own expense . . . .*
>
> *That said, I agree that the lawyer appointed by the NHWU should reassess the case and answer the members' questions and then give a final decision. . . . (whether or not to proceed with the matter)*

. . .

[24] On November 21, 2006, Gary Trivett, the respondent's representative in Ottawa, sent Mr. Genest an email responding to the complainants' request for more details regarding Mr. Bélec's legal opinion. He wrote the following:

> [Translation]
>
> . . .
>
> *I am late with answering my emails. I did receive the request for questions to the lawyer from whom I requested an opinion.*
>
> *I am told that a legal opinion is always the property of the lawyer who issues it. His opinion is undoubtedly based on reading the file, and I am not in any position to ask him for a second opinion based on another lawyer's opinion.*
>
> *The members wanted an opinion on their chances of success; they did not find it favourable, and they put the question to another lawyer, who gave them the answer that they wanted.*

> *I believe that we have fulfilled our duty. If the members wish to take further proceedings, they are always free to do so, but as you and Mona explained to them, such proceedings would be at their expense.*
>
> . . .

[25] Ms. Dumont stated that she discussed the respondent's refusal to pay the legal fees with Mr. Croteau, who apparently told her that it was possible to file a complaint with the Public Service Labour Relations Board. Ms. Dumont stated that Mr. Croteau did not help them prepare the complaint.

[26] Ms. Gauthier testified about preparing the complaint. She stated that none of the complainants had any knowledge of the *Act* or any expertise in that area. Ms. Gauthier further stated that they had received no help and that they had misinterpreted the *Act*, with the result that they selected the wrong section.

IV. Summary of the arguments

A. Objection to the Board's jurisdiction

1. For the respondent

[27] The respondent argued that paragraph 190(1)(*b*) of the *Act* does not provide for an individual remedy or a remedy based on the circumstances alleged by the complainants.

[28] Paragraph 190(1)(*b*) of the *Act* refers to a failure by the employer or bargaining agent to comply with the duty to bargain in good faith stated in section 106. That provision applies to two parties, the employer and the bargaining agent, in the specific context of negotiating a collective agreement. It offers no individual remedies to members of a bargaining unit. The respondent further submitted that the Board has no jurisdiction to rule on the relief sought by the complainants, who are asking the employer to give them indeterminate status. The respondent referred me to *Dumont et al. v. Department of Social Development*, 2008 PSLRB 15.

[29] The respondent further objected to the complainants' amending their complaints so as to rely on other provisions of the *Act*. According to the respondent, the complainants were able to obtain the advice of counsel before filing their complaints. The complaints were duly filed and should be taken as they stand.

2. For the complainants

[30] The complainants argued that they prepared the complaints to the best of their abilities. They read section 190 of the *Act* and found no paragraph that could clearly apply to their case. On the complaint form, therefore, they ticked the paragraph that seemed most appropriate. They argued that they were not experts and that they received no help in preparing their complaints. Alternatively, the complainants asked to be allowed to amend their complaints to invoke the correct section of the *Act*.

B. Merits of the complaints

1. For the complainants

[31] The complainants argued that they were misdirected and poorly represented by the respondent from the start of the proceedings initiated to challenge their layoffs. In particular, they allege that the respondent did not initially institute the correct proceedings to challenge their layoffs. They further allege that the respondent should not have refused to pay Mr. Croteau's fees, so that he could proceed with the matter.

2. For the respondent

[32] The respondent submitted that it properly performed its duty of representing the complainants. It argued that the evidence, in particular the documents filed by the complainants, clearly establishes that the respondent supported the complainants' efforts and dealt with the matter at every stage. The respondent added that it would be going beyond its duties to retain the services of counsel to analyze the complainants' case. The respondent further submitted that the complainants' disagreement with the lawyer's opinion does not indicate that the legal opinion was wrong. There is also nothing to indicate that the opinion of the second lawyer, consulted by the complainants, was "[translation] the right answer." Further, the respondent argued that the complainants knew that if they approached a lawyer other than the one hired by the respondent, it would be at their own expense.

V. Reasons

A. Objection to the Board's jurisdiction

[33] Complaints submitted to the Board must be made using the form provided for that purpose. In Part 3 of the complaint form, the complainant must tick the paragraph of the *Act* on which the complaint is based. The complainants ticked paragraph 190(1)(*b*), which deals with a failure to bargain in good faith.

[34] Although the complainants indicated in the complaint form that their complaints were based on a failure to bargain in good faith, it is clear from the testimony of Ms. Dumont and Ms. Gauthier Tardif that the complainants blame the respondent for not performing its duty to represent them in a fair manner. The complaint form also contains indications of allegations made against the respondent.

[35] Part 8 of the complaint form requires that a complainant indicate the "Steps that have been taken . . . for the resolution of the action, omission or other matter giving rise to the complaint." The complainants wrote the following in Part 8:

> [Translation]
>
> *Further to our complaint, we had several meetings with our union local. Our union asked the National to find us a lawyer. The answer received from that lawyer, Roland Bélec, did not satisfy us. We tried to get further explanations from that lawyer, but Gary Trivett replied that the lawyer did not have to justify his decision.*
>
> *We have seen another lawyer in private practice to discuss our case. That lawyer found that we had a good case. He agreed that he would take on our case, but financially we were unable to proceed. We asked our union for help, but Gary Trivett of the National replied in the negative.*

[36] In Part 10 of the complaint form ("Other matters relevant to the complaint"), the complainants wrote the following: "[translation] We think that our union has not adequately defended or represented us in this case."

[37] In Part 3 of the complaint form, the complainants ticked the wrong paragraph of the *Act*. To support their complaints, the complainants should have relied on paragraph 190(1)(*g*), which provides for the hearing of a complaint for unfair labour practices within the meaning of section 185. Section 185 of the *Act* indicates that

"unfair labour practice" means anything that is prohibited by section 187, which provides as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[38] I am of the view that this is a situation in which substance should take precedence over form and, in this case, the complaints should be considered as being based on paragraph 190(1)(*g*) of the *Act*. In fact, section 241 of the *Act* provides that any defect in form or technical irregularity cannot serve to invalidate proceedings covered by the *Act*. I am of the opinion that in the present circumstances the complainants' error is a defect in form or technical irregularity.

[39] To begin with, it is clear that the complainants are not lawyers or experts in labour law. It is far from obvious to an amateur, who must identify the paragraph of subsection 190(1) of the *Act* on which to base his or her complaint, that paragraph 190(1)(*g*), which deals with unfair labour practices, includes a lack of proper representation.

[40] Further, and as indicated earlier, it seems clear from both the complaint forms and the evidence heard at the outset that the objection made against the respondent concerned the respondent's duty of representation. In that regard, the complainants' allegations did not take the respondent not taken by surprise, since it had the complaint forms in its possession. Moreover, in a letter to the Board dated January 24, 2007, the respondent's representative identified the complainants' allegations as follows:

> [Translation]
>
> . . .
>
> *The allegations by Ms. Dumont, Ms. Guay, Ms. Gauthier-Tardif, Ms. Boulay and Ms. Jomphe deal with the union's refusal to pay the cost of a second lawyer from a private firm in representing them on a complaint filed with the Public Service Commission in 2003 and a complaint filed with the Treasury Board in 2004.*

. . .

[41] Accordingly, I believe, in the particular circumstances of this case, that the complaints should be considered as being based on paragraph 190(1)(*g*) of the *Act*. Accordingly, the respondent's objection is dismissed.

B. Decision on the merits of the complaints

[42] I must now determine, under section 187 of the *Act*, whether the respondent acted in an arbitrary or discriminatory manner or in bad faith in handling the complainants' case.

[43] Dealing with unions' duty of representation, the Supreme Court of Canada summarized the applicable principles in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509:

. . .

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

. . .

[44] These principles are general parameters that apply to a union's general duty of fair representation and are not limited to grievance cases.

[45] In this case, it cannot be concluded on the evidence that the respondent acted in an arbitrary or discriminatory manner or in bad faith in the support given to the complainants and in the follow-up to the complainants' challenges.

[46] The evidence clearly shows that, once the complainants were laid off, the respondent guided and advised the complainants on the various remedies that they could seek.

[47] First, on the respondent's recommendation, the complainants challenged their layoffs with the PSC. Although the PSC refused to hear the complainants' challenges for lack of jurisdiction, there is nothing to indicate that the challenge filed was wholly without merit. Furthermore, the jurisprudence has recognized that a union is entitled to err in its assessment of a case. In *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSSRB 70, the Board stated the following, at paragraph 125:

> *[125] The respondent is allowed to make a mistake in its evaluation of the case. The duty of fair representation is not the equivalent of an insurance against error and omissions. Courts and labour boards have addressed this issue a number of times. In* Quesnel v. Ontario Public Service Employees Union and Ministry of the Attorney General, *[2004] OLRB Rep. January/February 133 (QL), the Ontario Labour Relations Board commented in these terms:*
>
> . . .
>
> > . . . the mere fact that a union representative has made a mistake in the way in which it has processed a grievance on behalf of an employee does not necessarily mean that the union has breached its standard of fair representation, even where that mistake has resulted in prejudice to the employee(s) concerned . . . .
>
> . . .

[48] In this case, the error made in taking the objection to the wrong forum, if that selection was an error, caused the complainants no prejudice. When the PSC refused to hear the complainants' challenges, the respondent filed a complaint with the Treasury

Board. Although that complaint was dismissed on July 26, 2004, it was disposed of on the merits, and the delay in filing the complaint was not considered a problem.

[49] Following the dismissal of those complaints, the respondent continued to act on the complainants' case. In October 2005, based on new information presented, the respondent submitted an application to review the decision rendered on July 26, 2004.

[50] Following Mr. Burton's refusal to review the decision of July 26, 2004, the respondent agreed to consult a lawyer in private practice at its expense. There was indeed a certain delay that resulted from finding a francophone lawyer, but there is no proof of negligence or bad faith. A lawyer was finally located, and he provided a legal opinion on August 15, 2006. There is nothing to show that his legal opinion was incorrect.

[51] The complainants were dissatisfied with that lawyer's opinion and decided to consult another lawyer. I am of the view that, in refusing to pay the fees of this second lawyer, the respondent did not fail to perform its duty of representation, which in my view did not encompass payment of that lawyer's fees. The complainants were entirely free to consult a second lawyer, but, in the circumstances, they could not require the respondent to pay the cost of doing so.

[52] I understand the complainants' disappointment since they took various steps to challenge their layoffs, which proved futile, and, due to a lack of funds, they were unable to proceed with their efforts after consulting a second lawyer. At the same time, I am of the opinion that the respondent cannot be blamed for this situation. The respondent's representatives supported the complainants in their objections from the time of their layoff and initiated actions that they felt were proper, even submitting the case to a lawyer. As indicated, the respondent's duty did not encompass having to pay the fees of a second lawyer. Therefore, I conclude that, in this case, there is no proof of any arbitrary or discriminatory actions or bad faith by the respondent's representatives.

[53] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[54] The complaints are dismissed.

August 27, 2008.

PSLRB Translation

Marie-Josée Bédard,
Vice-Chairperson